

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

DAVID R. SIMCOKE,

Petitioner

v.

//

CIVIL ACTION NO. 1:07CV77
(Judge Keeley)

WAYNE PHILLIPS,

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION

On June 12, 2007, pro se petitioner, David R. Simcoke, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. The Court referred this matter to United States Magistrate Judge James E. Seibert for initial screening and a report and recommendation in accordance with Local Rule of Prisoner Litigation 83.09.

On September 6, 2007, Magistrate Judge Seibert issued a Report and Recommendation recommending that the petition be granted and the Bureau of Prisons ("BOP") be directed to reconsider the Petitioner for RRC placement utilizing the five factors set forth in 18 U.S.C. § 3621(b). The Magistrate Judge held that the language of § 3621 clearly sets forth the five enumerated factors the BOP must consider in making placement and transfer determinations and further determined that the 2005 regulations do not permit the BOP to consider the three individualized facts. Accordingly, Magistrate Judge Seibert determined that the case manager, Lisa Little's, declaration regarding petitioner's RRC referral does not contain 1) an assessment of the resources of the facility contemplated, 2) a

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discussion of the nature and circumstances of the offense committed by the petitioner, 3) a true evaluation of the history and characteristics of the petitioner, or 4) an indication that any statement by the court that imposed the sentence was taken into consideration. Furthermore, the Magistrate Judge found that Ms. Little's declaration also failed to evaluate all of the factors listed in Title 28, § 944(a)(2).

Accordingly, Magistrate Judge Seibert recommended that the petitioner's § 2241 petition be **GRANTED** and the BOP be directed to reconsider the petitioner's RRC placement utilizing the five factors set forth in 18 U.S.C. § 362(b). On September 11, 2007, Magistrate Judge Seibert entered an order correcting the report and recommendation regarding its failure to address the respondent's motion to dismiss. Therefore, Magistrate Judge Seibert further recommended that the respondent's Motion to Dismiss (Docket No. 8) be **DENIED**.

The Report and Recommendation also specifically warned that failure to object to the report and recommendation would result in the waiver of any appellate rights on this issue. Nevertheless, neither party filed any objections.¹

¹ The failure of the parties to object to the Report and Recommendation not only waives their appellate rights in this matter, but also relieves the Court of any obligation to conduct a de novo review of the issue presented. See Thomas v. Arn, 474 U.S. 140, 148-153 (1985); Wells v. Shriners Hosp., 109 F.3d 198, 199-200 (4th Cir. 1997).

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Consequently, the Court **ADOPTS** the Report and Recommendation in its entirety and **GRANTS** the Petition for Writ of Habeas Corpus (docket no. 1), **DIRECTS** the BOP to reconsider petitioner's RRC placement utilizing the five factors in 18 U.S.C. § 362(b), **DENIES** the respondent's motion to dismiss (Docket No. 8) and **ORDERS** the case **DISMISSED WITHOUT PREJUDICE** and stricken from the Court's docket.

The Clerk is directed to mail a copy of this Order to the pro se petitioner, certified mail, return receipt requested, and to transmit copies of this Order to counsel of record.

Dated: September 18, 2007

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE